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September 6, 2000

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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SEP 6 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and three copies of a written ex parte presentation in the above-captioned proceedings. On September 6, 2000, the enclosed letter was delivered to Peter Tenhula of Commissioner Powell's office.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By


Matthew C. Ames

cc: Peter Tenhula
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Clint Odom
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 6, 2000

BY HAND

Peter Tenhula, Esq.
Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Promotion of Competitive Networks in Local Telecommunications
Markets*, WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Tenhula:

During our meeting yesterday on behalf of the Real Access Alliance, you asked for our views regarding the applicability of *Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945), to justify Commission regulation of access to buildings. As you know, the Smart Buildings Policy Project ("SBPP") has cited the case in numerous recent *ex parte* filings.¹ SBPP claims that the *Ambassador* case stands for the proposition that the Commission can join non-carrier parties who would be affected by or have an interest in a particular practice being investigated. While this may be true as a general proposition, it has no bearing on the issues being addressed in this docket. SBPP goes further and implies that *Ambassador* and Section 411(a) of the

¹ See, e.g., letter from Gunnar Halley to Peter Tenhula, filed Aug. 18, 2000; Teligent meeting with Kathryn Brown, notice filed Aug. 16, 2000; letter from Phil Verveer to Adam Krinsky, filed August 9, 2000; SBPP meeting with Helgi Walker, notice filed Aug. 9, 2000; SBPP meeting with Adam Krinsky, notice filed Aug. 8, 2000; SBPP meeting with Clint Odom, notice filed Aug. 8, 2000.

Communications Act, the key statutory provision in the case, have been used in a manner that would allow the Commission to regulate building owners. This is simply not true.

From the beginning, SBPP and its allies have attempted to lead the Commission down the jurisdictional garden path by blurring the issues and introducing far-fetched legal theories. SBPP's reliance on the *Ambassador* case is of the same pattern. *Ambassador* has absolutely nothing to do with the regulation of building owners or the terms on which carriers are permitted to enter or use private property. The case stands for the unobjectionable principle that the Commission can interpret and enforce the terms of lawful tariffs filed by carriers. In the course of adjudicating such a case, the Commission may be able to assert jurisdiction over a carrier's customer. That is as far as the case goes, despite SBPP's efforts to stretch its meaning and reach. If the *Ambassador* case has any relevance at all in this proceeding, it is because it limits the Commission's ability to regulate building owners indirectly, through its authority over carriers.

The facts in the case are simple: Hotels in the District of Columbia had obtained telephone service under tariff. The hotels had also installed private branch exchange equipment and employed their own personnel to operate the PBX and connect guests with the public switched network for local and long distance calls. The hotels charged their guests a surcharge on each outside call, which exceeded the tariffed rate at which the hotels paid for service; the tariffs under which the hotels obtained service prohibited the surcharges. In effect, acting either as agents or subscribers of the carrier, the hotels were reselling service. The Commission asked the Attorney General to seek an injunction against the hotels. An injunction was issued, and the Supreme Court upheld the district court's decision. As part of its holding, the Supreme Court found that the hotels were proper parties to the enforcement action under Section 411(a).

SBPP's reliance on *Ambassador* and Section 411(a) is misplaced for the following reasons:

The *Ambassador* case did not involve a rulemaking proceeding. SBPP does not explicitly claim that *Ambassador* or Section 411(a) could be applied to exercise jurisdiction over building owners in the context of a rulemaking, but we wish to dispel any such suggestion.² Because *Ambassador* involved an adjudication in district court, the case cannot be said to stand for the proposition that Section 411(a) gives the Commission general jurisdiction or authority to adopt rules affecting hotels or building owners. Nearly all of the cases that cite *Ambassador* involve the interpretation or enforcement of tariffs or other types of adjudications. This is

² In its *ex parte* filings, SBPP appears to have cited only one item related to a rulemaking decision, and that item stated only that the rules under consideration could be enforced under Section 411(a). Amendment of Part 64 of the Commission's Rules Relating to Use of Recording Devices by Telephone Companies, Docket No. 17152, *Notice of Proposed Rulemaking*, 6 FCC2d 587, 589 (1967) (concurring statement of Commissioner Cox). SBPP makes much of this statement, which serves only to illustrate the paucity of precedent supporting SBPP's argument. We agree that the Commission can join telephone subscribers in cases involving tariff enforcement, but we fail to see how this helps SBPP, because agreements granting carriers the right to enter and occupy buildings are not tariffs.

because Section 411(a) was intended to apply only in adjudications: the title of the section is "Joinder of Parties" and the term "joinder" typically arises in the context of litigation rather than rulemaking. Furthermore, Section 411(a) itself states that it applies to proceedings "for the enforcement of the provisions" of the Communications Act, and contains no reference to rulemakings. If Section 411(a) were read any other way, it would subsume the limitations on the Commission's jurisdiction in Section 2 of the Act and allow the Commission to initiate rulemakings beyond the bounds set in Section 2.

The *Ambassador* case does not permit the Commission to regulate the terms of building access. The defendant hotels in *Ambassador* were either resellers or agents of the carrier, and they had contracts with the carrier in the form of the tariffs under which they obtained telephone service. It was that relationship that was being regulated, and that is a critical difference between the subject of this proceeding and the *Ambassador* case. Building owners may subscribe to receive telecommunications services, and if disputes arise regarding the terms on which service is to be provided, the Commission may have jurisdiction to join building owners because they are subscribers. But the terms on which a building owner subscribes to service have nothing to do with any rights a carrier may have to install facilities in a building. This is the critical error SBPP has repeatedly made throughout this proceeding: building access agreements are not agreements for the provision of telecommunications services, but rather agreements for the right to use property. With the states, the Commission has the authority, jurisdiction, and expertise to regulate the terms on which telecommunications services are provided, but it has neither authority, jurisdiction nor expertise with respect to real estate matters. That a piece of real estate may be used to in connection with the provision of telecommunications services is irrelevant: the Commission can no more regulate the terms of building access than it can regulate the rents carriers pay for administrative office space.

The Commission cannot regulate the real estate operations of building owners indirectly by regulating carriers. In *Ambassador*, the Supreme Court stated that a carrier "may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility services, the regulation will necessarily affect, to that extent, its third party relationships." 325 U.S. at 323-324. In other words, the only rights a carrier has against a building owner that can be enforced under Section 411(a) are those related to the provision of the carrier's service. It is important to remember that when a building owner grants a telecommunications provider access to a building, the purpose of the agreement is not to extend service to the owner, but to the owner's tenants. Service is not provided to the building or the building owner, but to subscribers occupying the building. SBPP itself claims to be concerned with the extension of service to tenants, and wishes to remove the owner from the process as much as possible. The owner is not the subscriber or the recipient of telecommunications services. If anything, the owner is providing a service to the carrier, in the form of the construction and management of the building, which creates a market for the carrier. Therefore, the Commission cannot impose requirements on carriers that are intended to induce building owners to grant nondiscriminatory access to buildings, because building access is

unrelated to the terms of any service to which the building owner may actually subscribe. The Commission may be able to regulate a building owner that is itself reselling services (as in *Ambassador*), acting as an aggregator, or providing Shared Tenant Services. But allowing a carrier to occupy space in a building is not the same as any of those things.

None of the precedent cited by SBPP would justify joinder of building owners. In addition to its misleading interpretation of the *Ambassador* case, SBPP claims that the Commission has used Section 411(a) to join interested or affected parties "typically above the objection of the joined parties," implying that this precedent would justify joining building owners. This is simply untrue. The Commission has found it necessary to join affiliated entities, successors or predecessors in interest, and sometimes officers, directors and shareholders.³ As noted earlier, the customer of a carrier may be joined if the dispute concerns a tariff. But none of the cases cited by SBPP deals with building owners, with real property, or indeed with any party not intimately engaged in an activity clearly subject to Commission regulation. Once again, the essence of the matter before the Commission has to do with the use of real property, not communications. Building owners are not typically affiliated with carriers or involved in managing their activities. If they are, they might become subject to joinder under Section 411(a) in that capacity. But merely allowing a carrier to occupy real estate is not sufficient to justify joinder. Otherwise, the Commission would be able to assert control over any person that has a contractual relationship of any kind with a carrier. For that reason, if the Commission were to attempt to join a building owner under its Section 208 complaint process, any Commission decision would be extremely vulnerable on appeal.

SBPP and its allies have demonstrated that they will go to great lengths to pursue their goal, but they have yet to propose a sound theory to justify or permit Commission action. The novelty of their arguments is a good measure of the weakness of their case. The Commission has

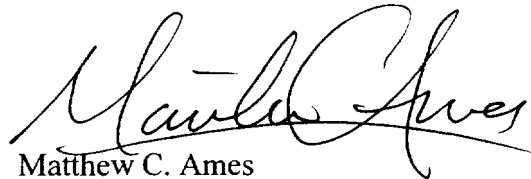
³ SBPP cites six cases, all which involve or refer to the authority to join corporate affiliates or shareholders of entities subject to Commission jurisdiction. Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co., Docket No. 17441, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969) (AT&T joined as parent of New York Telephone); Armstrong Utilities v. General Telephone Company of Pennsylvania, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970) (joinder of parent and affiliate); Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, Docket Nos. 191951, 19152 P-C-7655 P-C- 7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971) (joinder of successor in interest); Continental Cablevision of New Hampshire, Inc., Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d at ¶ 6 (1974) (joinder of parent corporation); Comark Cable Fund III v. Northwestern Indiana Telephone Co., File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985) (predecessor in interest and sole officer, director and shareholder). SBPP also cites General Services Administration v. AT&T, File No. E-81-36, *Order*, 2 FCC Rcd3574, at n. 20 (1987), apparently because it contains language implying that a broad range of persons can be brought before the Commission under Section 411(a). Nothing in the decision, however, actually supports an interpretation broad enough to allow joinder of building owners merely because they have granted a carrier the right to occupy their property.

no authority to prescribe the terms on which building owners allow carriers to occupy space in buildings, which is why SBPP is unable to find a compelling argument.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By


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